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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

EARL G. SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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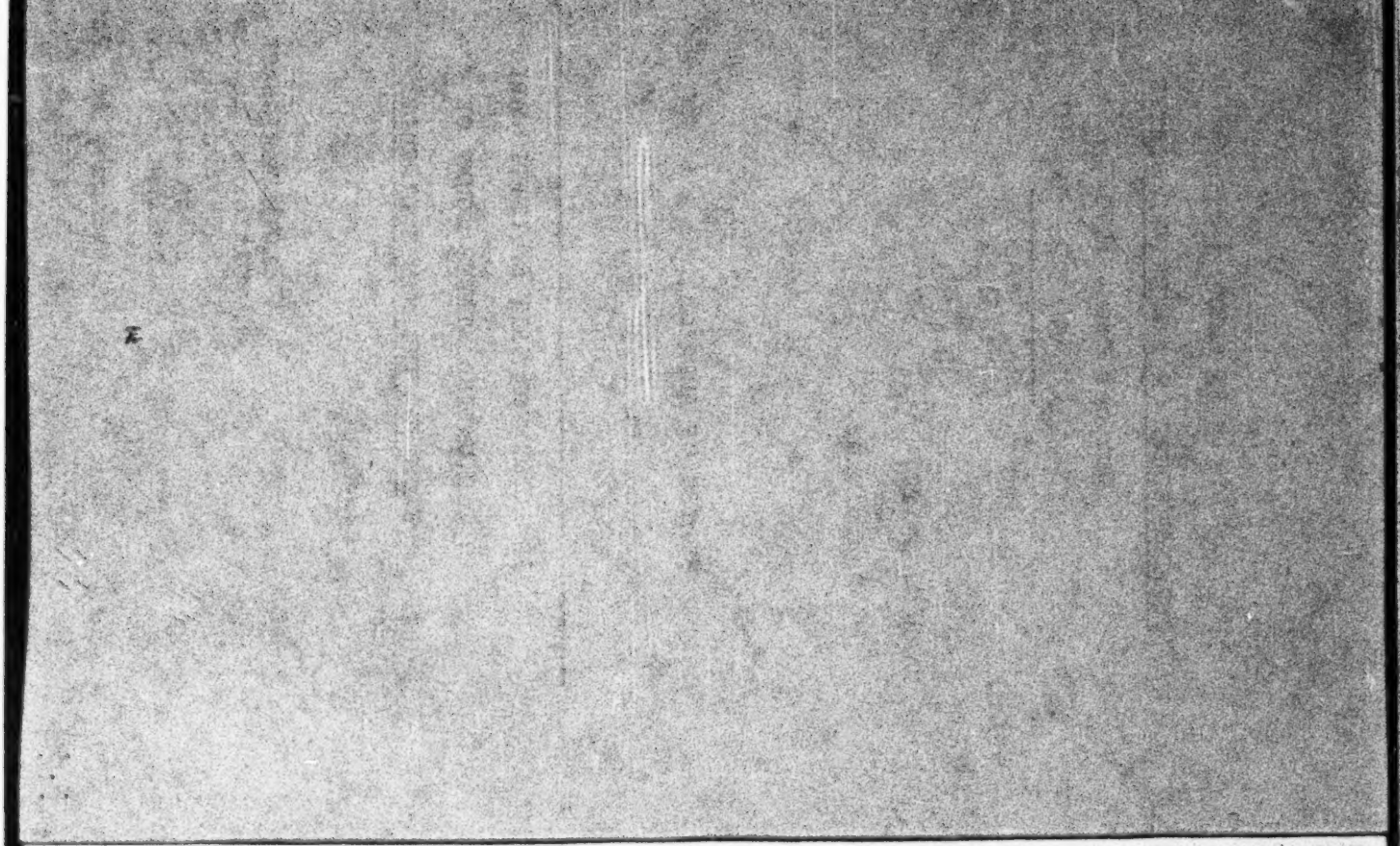

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I

The forcible entry of plainclothes policemen into a home, after they had already arrested the sole person named in the warrant on the street near the house, was unreasonable and unjustified in the light of their knowledge that an innocent man and child were on the premises. Such action was a violation of the right of the "the people to be secure in their persons, houses, papers and

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I

The forcible entry of plainclothes policemen into a home, after they had already arrested the sole person named in the warrant on the street near the house, was unreasonable and unjustified in the light of their knowledge that an innocent man and child were on the premises. Such action was a violation of the right of the "the people to be secure in their persons, houses, papers and

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III

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The opinion of the Court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the California Supreme Court was entered May 16, 1973.

The jurisdiction of this Court rests on 28 U.S.C.A. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE BREAKING AND ENTERING OF ONE'S HOME AND CREATING A SHOOTOUT WHEN THE MEANS OF AVOIDANCE OF THE CONFRONTATION IS AT HAND; COMPLIED WITH THIS COURT'S HOLDINGS IN SIBRON v. NEW YORK AND TERRY v. STATE OF OHIO

II

WHETHER BREAKING AND ENTERING ONE'S HOME WITHOUT PROPER NOTICE IS VIOLATIVE OF THE 4th AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCH AND SEIZURE AND OF THE RULING OF THIS COURT IN SABBATH v. UNITED STATES

III

WHETHER THERE WAS A VIOLATION OF PETITIONER'S RIGHT OF DUE PROCESS AS REQUIRED IN THE 14th AMENDMENT WHEN THE COURT ABUSED IT'S DISCRETION BY FAILING TO APPLY REASONABLE STANDARDS IN ITS DECISION TO ADMIT PRIOR FELONY CONVICTIONS TO IMPEACH PETITIONER'S TESTIMONY.

STATUTES INVOLVED

4th AMENDMENT OF THE UNITED STATES CONSTITUTION

6th AMENDMENT OF THE UNITED STATES CONSTITUTION

14th AMENDMENT OF THE UNITED STATES CONSTITUTION

STATEMENT OF THE CASE

On October 15, 1971, the Los Angeles County District Attorney filed an Information accusing Petitioner, Earl G. Smith, of two counts of assault with a deadly weapon with intent to commit murder, and one count of violation of the dangerous weapons control law, violations of Penal Code Sections 217 and 12021, respectively. (C.T. 1,2,3)

The Petitioner was arraigned on October 15, 1971, pled not guilty, and the trial was set for December 1, 1971. The trial was continued several times until it began on March 2, 1972. Count three was dismissed on a motion of the people. (C.T. 4-19).

On March 2, 1972, jurors were selected and sworn to try the case (C.T.19). On March 8, 1972, the jury was given instructions and returned a verdict of guilty on March 9, 1972, on two counts of assault with a deadly weapon, a felony, in violation of

of Penal Code section 245, a lesser but necessarily included offense to that stated in the information. (C.T. 23-66)

The jury was polled on March 9, 1972 and answered in the affirmative, as to the verdict of guilty. Defendant was referred to the Probation Department and Probation and sentence hearing and motion for new trial were continued to March 30, 1972. (C.T. 67)

On March 30, 1972, defendant's motion for a new trial was denied, probation was denied, and the defendant filed notice of appeal. Defendant's motion for bail on appeal was denied and bail exonerated. Also on that same date, sentence on count 2 was stayed pending completion of sentence on count 1 at which time stay on count 2 is to become permanent. (C.T. 68)

On April 4, 1972, a notice of appeal was filed from the judgment rendered on March 30, 1972. (C.T. 69).

On June 9, 1972, an appeal was filed with the California Court of Appeals, Second District. Judgment was affirmed on March 19, 1973.

On April 2, 1973 a Petition for Rehearing to the California Court of Appeals was filed. The Petition was denied April 4, 1973.

On April 19, 1973, a Petition for Hearing before the California Supreme Court was filed. It was denied on May 16, 1973.

STATEMENT OF FACTS

Earl G. Smith, defendant, testified that approximately one week before the evening of July 7, 1971, he had a conversation with Mrs. Dorothy Cummings, alias Dorothy Smith, who is the mother of his nine year old son, Earl Jr. He testified that he and the boy lived with his mother, but would occasionally visit Dorothy. In that conversation between the defendant and Dorothy Smith, he said she told him that somebody had been hanging around her house trying to get in and that neighbors had told her that they had seen prowlers around the house. Dorothy Smith told the defendant that she was afraid for herself and her daughter Paula, and asked him to come by, which he agreed to do, dropping by in the week before the incident. (R.T. 218-223) He stated that she had told him that one day the prowlers had knocked on the door, and while one tried to gain entrance by asking her

to use the telephone, another was at the sid of the house. She described to the defendan that the man who tried to gain entrance by asking her to use the telephone, was tall, heavy-set and light skinned. Dorothy also mentioned that there had been burglaries in the neighborhood, and the defendant suggested that the next time a guy showed up to call the police. (R.T. 241, 242)

The defendant stated that he believed i necessary to have loaded firearms at the house (a pistol and shotgun) because he was not there all the time (R.T. 243) (The defendant was employed as a truck driver). The defendant testified that he figured anybody that would want to try to break into the house would be armed. (R.T. 245, 24

On the day of July 7, 1971, the defendant stated that he came over to Dorothy Smith's house around 2 p.m. He said that he guessed it was about a half-hour before six when he was sitting on the bed watching

T.V., he heard Dorothy say she was going to the store. The defendant testified that he was in a dozing state, he didn't know how deep a sleep, but that he woke up startled, when he heard the dogs barking, and a real large pounding sound. The defendant stated that he believed the people were robbers. He said that as he was reaching for the pistol on the night stand, he heard another large pounding noise, and opened the closed bedroom door, at which time he saw a large man charging toward him, so he raised his gun and fired. Smith stated that he wasn't firing exactly at the man, but was trying to fire over his head, because he had ducked to the side. Upon cross-examination, the defendant said that he honestly didn't shoot to hit the man. (R.T. 253) Smith stated that the man started shooting back at him and that to his left, he saw another man, (what looked like two men) coming through the door and he fired at that man and

emptied his gun. (R.T. 223-226) Upon cross-examination, the defendant stated that the man he saw coming towards him was very large, wearing colored clothes, and that he didn't see a badge on his shirt, but the man was carrying a gun. (R.T. 248) All of the above testimony was uncontradicted.

The defendant said that he heard no one calling "Police Officers" or saying anything about a search warrant up to that time, and believed the intruders were robbers. Smith testified that after firing the shots, he went back into the bedroom and as he was shutting the door, was shot in the groin and the arm. Once in the bedroom he reached for the shotgun underneath the bed, took it out of the case, and pointed it at the door. Smith said that then he heard voices outside saying "where's Charlie, well don't go near the door," and for the first time he heard a voice say something about a "police unit." (R.T. 223-228)

Upon hearing mention of the word "police," Smith testified that he pulled the shotgun back and asked "who are you guys?" Smith stated that when he heard the response "Police Officer," he replied, "Wow, man, I didn't know you were police officers." Smith stated that he was then commanded to drop his gun, which order he obeyed, and told to come out with his hands out and he did so. According to the defendant's testimony at this time, he said to the officer standing there, "Man, I am sorry. I didn't know you were police officers, thought you were robbers." He was then told to lie down and was handcuffed. (R.T. 228-229)

Michael J. Celmer, police sergeant for the City of Los Angeles, Administrative Narcotics Division, testified that he along with three other officers, at around 6 p.m. July 7, 1971, went to 3660 58th Place to serve a search warrant for that address and for the person of Dorothy Smith, alias Dorothy

Cummings. Upon arrival, the person to be searched was observed driving away and Dorothy Smith was then stopped on Dean Stree just slightly north of 58th Place at which time Officer Celmer approached the vehicle, advised her that he was a police officer with a search warrant to search her person and showed her an original copy of the warra Dorothy Smith then exited the car and a revolver with clip and bullets was found in her purse. (R.T. 83,84,86)

After removing the items from Dorothy Smith's purse, Celmer took her into custody and gave a copy of the warrant to Sergeant Del Rosario and informed him, Sergeant Maga, and Officer Sears to go ahead to the locatio to execute the search warrant while he took Mrs. Smith into custody. However, Celmer testified that prior to giving these instruc tions, he had a short conversation with Mrs. Smith at which time she revealed that her daughter and boyfriend or husband (the

officer could not recall which term was used) were inside the premises. (R.T. 87)

Officer Sears stated that he is 6'6 1/2" Tall, weighs 230 pounds, and at the time of the incident was wearing a sports shirt, regular pants, and that he did not put on his police badge until he was walking down the driveway of the house (R.T. 5,6). Sears testified that he walked across the front lawn and that he took it that Del Rosario was behind him, although he didn't look behind him, and that when he reached the driveway, he saw two barking dogs of average size on the porch, one tied to the screen. Due to the dogs, he decided to continue walking down the driveway instead of approaching the porch, telling Del Rosario that he would check for a back door and upon doing so, found none and stated that to Del Rosario. (R.T. 9).

Sergeant Del Rosario testified that

he also was dressed in plain clothes, a pair of blue pants and a blue t-shirt or polo shirt, and is 6'3 1/2 tall. (R.T. 69) After Sears returned from the rear of the house, Del Rosario stated that he and Sears proceeded to a side door and that Sears placed himself just aside the door behind him. Officer Del Rosario stated that he knocked loudly and said "Police Officer, I have a search warrant for this location. Open the door," and waited approximately 30 seconds or so. (R.T. 53) In his testimony, Officer Sears stated that he recalled Del Rosario's words to be "Police Officer, we have a search warrant to search this house." (R.T. 10) Del Rosario said that after receiving no response, he repeated the same words, knocked again stating "Police Officers, I have a search warrant for this location. Open the door." (R.T. 53, 54) (Note the words "Open the door," a requirement under California Penal Code Section

1531 did not appear in Del Rosario's testimony of his first statement or Sears recollection).

Del Rosario stated that after the second knock, he waited another period of time and then his partner, Officer Sears, knocked. (R.T. 54) Sears stated that he heard movement in the house, hollered "Police Officer, open the door. We have a search warrant," and that after an approximate 30 second lapse of time, Sergeant Del Rosario, stated that to the best of his recollection, he might have been on the second of the three steps of the side porchway when he forced entry and that he was running when he entered the side porch area. He further stated that he had no arrest warrant for anyone in the house and had never heard of Earl Smith. It was stated by Del Rosario that he entered the house by force because he believed that the persons in the house were either destroying contraband or arming themselves.

(Mrs. Smith had stated that her young daughter and a man were in the house). Del Rosario, thinking that people inside were arming themselves, ran into the house with his gun in his holster. He stated that at some point when he was running into the house, he heard a single gunshot, then heard several more, and was hit and fell and maintained that he did not see the individual at the time of the first shot. He stated that it wasn't until the several shots following the single shot that he saw the individual. (R.T. 77). He stated that 5 seconds, perhaps, elapsed from the time he crashed in the door to when he got hit. (C.T. 78). Upon redirect examination, Del Rosario stated that the reason he and the other officer approached the house at a fast pace, was that from the position where Mrs. Smith's vehicle was stopped by the other officers, that it would have made it very easy for someone in the house to

see and leave. He further stated that all the police vehicles were plainclothes cars. (R.T. 77)

Officer Sears testified that he had his weapon out at the time that Sergeant Del Rosario forced the door. (R.T. 17) Sears stated that he entered behind Del Rosario and part of him was in the bedroom and the other part still in the service porch, when he looked down the hall, saw an individual at the far end of the hall and a second or so later, that a shot was fired at him. He testified that he couldn't see the projectile, that it seemed to be coming his way, stating that he based this on the flash that appeared which "seemed to be in my direction." He said that at this time the individual firing the shot was in the hall. Sears stated that next he moved across the hall, towards the wall of the bedroom he was in and at the time he was doing that, he could see and hear more shots and couldn't

tell if the shots were coming at him. Sears stated that he began to shoot as soon as he could get his gun in a position to shoot, and that this all transpired in split seconds. Sears testified that he fired four shots from the time he left the service porch until he got to the bedroom wall where the closet was, at which point he had two more rounds left, looked down the hall toward the individual backing into the bedroom and the door closing at which time he fired the last two rounds at the individual and the door. Next he heard Del Rosario say he was hit and he believes he called for Sergeant Maga. Sears stated that then he hollered "Police Officer, come out of there with your hands up and throw down the gun." Sears said that after a 30, 40, or 45 second lapse he heard the defendant say "all right, I'm coming out and I am going to throw away the gun," or "throw down the gun," and that the defendant came out with his hands out and

front of him. About this time, Sears
ates Sergeant Celmer came into the hall
d handcuffed the defendant who was injured
d bleeding.
.T. 17-19)

Sergeant Celmer testified that when
l Rosario, Sears and Maga started towards
e house at a fast walk or trot, that he
mained on 58th Place and Dean Street with
s. Smith, who he had arrested, for from
seconds to a minute before he started
wards the house. When he was opposite
e house he heard the shots, grabbed Mrs.
ith and started towards the house. He
stified that when he brought her across
e street the gunfire had stopped. The
g tied to the screen door had taken off
wn the street with part of the screen door,
d a youngster had run out of the house.
.T. 125, 126). He stated that at this
me, he had custody of Mrs. Smith who had
come very concerned regarding what was

going on and a little panicky and identified the youngster as her daughter. At this time Sergeant Maga said that he would take Mrs. Smith while Sergeant Celmer went inside. (R.T. 96)

Sergeant Celmer entered, went and talked to Del Rosario and from the time he talked to Del Rosario until the time he entered and saw Sears, he estimated that about a minute transpired. Celmer stated that about a second after seeing Sears he observed the defendant and that the defendant was unarmed with his hands visible. He commanded the defendant to lie down and handcuffed him. Sergeant Celmer testified that he thinks that the first time the defendant spoke, was the first chance that he (Celmer) stopped speaking as he could not recall the exact time. The defendant's first statement, according to Celmer, was that he was sorry that he shot; that he didn't know they were police officers. (R.T. 152-158)

Mrs. Smith's daughter Paula, testified that around 6 p.m. she was changing her clothes in the back bedroom when she heard the dogs barking. She came out of her room and went to the living room to see why they were barking at which time she saw two men, one of whom was choking the puppy by holding his chain up and the other was going around to the back of the house. While standing at the door in the living room, she heard a kicking noise, which she said was too hard to be knocking and then heard gunshots and ran out the front door and hid in some bushes in the back yard. She stated that she never heard anybody call out "Police Officers" or "search warrant" or "open the door." She also stated that the defendant was not a frequent visitor at her house, but that he was over a lot the week before July 7th because of the trouble at the house. (R.T. 271-276)

Over defense counsel's objection, the defendant was asked about his prior conviction of conspiracy to sell narcotics. The defendant testified that he had never seen the narcotics and that his involvement had only been picking up the money. (R.T. 236,238)

The balloons of narcotics found on the premises were admitted into evidence. Notwithstanding an objection asserting an absolute lack of any evidence whatsoever that defendant had any knowledge of presence of narcotics in the house. (R.T. 214)

The defendant testified that he never saw the balloons in the planter, nor did he have any knowledge of them and had never seen balloons in the house except at a child's party. (R.T. 225) Mrs. Smith's daughter Paula also testified that she knew of no narcotics transactions going on in the house and that she hadn't seen any balloons in the living room. (R.T. 277,280)

I

THE FORCIBLE ENTRY OF PLAINCLOTHES POLICEMEN INTO A HOME, AFTER THEY HAD ALREADY ARRESTED THE SOLE PERSON NAMED IN THE WARRANT ON THE STREET NEAR THE HOUSE, WAS UNREASONABLE AND UNJUSTIFIED IN THE LIGHT OF THEIR KNOWLEDGE THAT AN INNOCENT MAN AND CHILD WERE ON THE PREMISES. SUCH ACTION WAS A VIOLATION OF THE RIGHT OF "THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES."

Even if the officers did have a valid arch warrant, and complied with Penal de Section's 1531's requirements, their rcible entry was a violation of the Fourth d Fourteenth Amendment rights of the per- ns in the house. In the present case the le individual named in the search warrant

had already been arrested outside the home and specifically alerted the police to the fact that a man and her child at that momen were in the home. All of the police were wearing plainclothes and driving unmarked vehicles. Since the arrestee had peacefull submitted to custody and made a point of relating the presence of others on the premises, the police should have asked her assist in effecting entry so as not to alar the occupants who could otherwise reasonabl believe that two men, 6'6 1/2" and 6'3" dressed in sportsclothes were intruders, rather than police officers if their announ ments were inaudible.

It is a common fact, known to us all, that when a T.V. or record player is on, oftentimes, an individual with the most astute auditory senses, will fail to hear a knock on the door. Almost every home dweller can recall at least one instance of missing a caller because T.V. or record

noise made the caller's knock or announcement inaudible. In the light of such common knowledge, the police should have asked the arrestee whether the occupants of the house had T.V. or records on which would keep them from hearing the officer's knock and announcement. Such an inquiry was really the minimal conduct expectable in view of the fact that an innocent man and child were on the premises and the only way the police could identify themselves to them, was through an audible knock and announcement because their appearances in sportsclothes most certainly provided no means of proper identification.

In the case of People v. Schad, 21 Cal. App. 3d 201, 98 Cal. Rptr. 439 (1971), the Court said of Penal Code section 1531, that "the rule is, of course, that the courts look only to the facts and circumstances with which the officer is faced at the time he makes his decision and acts upon it."

People v. Schad, 21 Cal. App. 3d. 209. As the United States Supreme Court stated in Sibron v. New York, 392 U.S. 40, 88 S. Ct. 1889 (1968), police conduct under a particular state statute (Section 180) "must be judged under the Reasonable Search and Seizure Clause of the Fourth Amendment."

It is well established that the type of police conduct in a particular situation must be guided by the exigencies of the circumstances in order to comply with the Fourth Amendment. The Supreme Court in Terry v. State of Ohio 392 US 1, 88 S. Ct. 1868 (1968), declared:

> "And in justifying the particular intrusion, the police must be able to point to specific and articulatable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

The scheme of the Fourth Amendment becomes

eaningful only when it is assured that
t some point the conduct of those charged
ith enforcing the laws can be subjected to
he more detached neutral scrutiny of a
udge who must evaluate the reasonableness of
particular search or seizure in light of
he particular circumstances; and in making
hat assessment, it is imperative that the
acts be judged against an objective standard.
ould the facts available to the officer
t the moment of the seizure or the search
warrant a man of reasonable caution in
he belief that the action taken was appro-
riate?" 392 U.S. 1, 21-22, 88 S. Ct.
868, 1880 (1968). It is quite convincing
hat given the facts of this case if we ask
he question, did the forcible entry of
he police"'warrant a man of reasonable
aution in the belief' that the action taken
as appropriate?" One could only answer in
he negative.

The United States Supreme Court has ruled in Sabbath v. United States, 391 U.S. 585, 88 S. Ct. 1755, that statute requiring prior notice and purpose before officers may "break open" door in order to execute search warrant, required office to make prior announcement of authority and purpose even though entry to defendant apartment was effected by opening closed, but unlocked door. In Sabbath, supra, peti was arrested by customs agents after one Jones had been persuaded by the agents to enter his apartment with a broadcasting device. The agents waited outside listeni on a receiving apparatus. The agents wait a few minutes and then proceeded to knock on the door and upon receiving no response opened the unlocked door. The Supreme Cou ruled that the agents had no basis for assuming Petitioner was armed or might res arrest or that informant Jones was in any danger. Nor as to the former, did the age

make any independent investigation of petitioner prior to setting the stage for his arrest with the narcotics in his possession.

Based on the principle espoused by the Supreme Court, that the quality and intensity of a police intrusion is dictated by the particular circumstances, are several California cases on point. In People v. Michelson, 59 Cal 2d 448, 30 Cal. Rptr. 18, (1963), the officer spotted a vehicle a few minutes after the commission of a crime which he observed to be carrying the alleged perpetrator of the crime. The officer had been given an explicit description of the robber which matched the suspect. As to the suspects conduct, the court in Michelson said:

> "The erratic route of the car and defendant's movement in the seat were at most suspicious circumstances."

Most crucial is the Michelson Court's

declaration that:

"Instead of interrogating Zauzig (the driver) and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that may connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation. It was not justified by probable cause to make an arrest, and it cannot be justified by what turned up." (People v. Michelson, supra.)

In Michelson, the wisest and most satisfactory course open to the police would have been to inquire whether the suspects had knowledge of the criminal deed in question or to call in to verify or disprove their suspicions or to return with the suspects to the market

ere the robbery occurred a few blocks
ay for identification. In our case the
lice knew that the people in the house
re innocent occupants who had not been
med in a warrant, nor had they committed
y crime. After apprehending the sole
spect of criminal activity, the police had
duty to protect defendant Smith and the
ild from a violent confrontation due to
staken identity of the police as intruders.
the Court held police conduct unreasonable
Michelson, supra, where so many circumstances
inted to a resemblance between the perpe-
rator of the crime and the individual
prehended, then police conduct consisting
forcible entry into a domicile where
nocent persons sat oblivious and unaware
what had transpired outside, would present
much more serious and drastic intrusion
nto an individual's constitutional sanctuary
gainst unreasonable searches.

Another good example of a policeman

exceeding the reasonable boundaries of conduct required by the circumstances, was People v. Simon 45 Cal. 2d 645, 290 P 2d 531 (1956). In Simon, an officer merely felt that defendant and another had no lawf business being in a warehouse district at 10:40 p.m. The officer saw that the other person was under 21 and had a liquor bottle in his possession, searched the defendant first, and asked questions only after he uncovered a marijuana cigarette in his possession. There was nothing whatsoever to indicate that had the officer made a reasonable inquiry dictated by the circumstances, he would have discovered anything to confirm his suspicion that defendant was under age. In fact, he possessed identification showing him to be 21 years old. The court held all evidence inadmissi because it was illegally obtained.

Both Michelson and Simon uphold the

constitutional principle that a man should never be subjected to intrusive police conduct when the officer has other more reasonable options of inquiry open to him. There would be a "chilling effect" on Fourth Amendment Rights if intrusive conduct is condoned where other alternatives were easily and readily available. Our case presents a graphic example of the disastrous consequences that can ensue, two wounded men, because of a failure on the part of the police to choose the most reasonable course in the light of the circumstances they knew to be existent at the time of the incident. Our case is an example of the imperative that the circumstances must define the scope of police conduct or both police and private citizens alike may become innocent victims of unnecessary violence.

II

THE TRIAL COURT ERRED IN READING SECTION 1531 OF THE PENAL CODE TO THE JURY BECAUSE IT MISLED THEM INTO BELIEVING THAT THE CRUCIAL QUESTION WAS THE LEGITIMACY OF THE OFFICERS CONDUCT, RATHER THAN THE REASONABLE BELIEF OF THE DEFENDANT AS TO THE SEVERITY AND NATURE OF THE THREAT POSED.

Petitioner contends that the reading of Penal Code Section 1531 to the jury and the reading of the various instructions on self-defense led the jury to believe that the two were mutually exclusive in that if they found police conduct legitimate under section 1531 then it followed that defendant's conduct was therefore unjustified and criminal. The jury was led to believe that police compliance with 1531 precluded the defendant from having a reasonable belief in his right to exercise self-defense. The police are not on trial and by reading

1531 as an instruction, the jury was persuaded into believing that there were two vying issues to be resolved - the reasonableness of the defendant's conduct. The jury was not made aware that they could find the conduct of both the defendant and the police to have been reasonable and legitimate in light of the facts of the case.

The inclusion of Section 1531 in the jury instructions implanted in the jury's minds the thesis that the reasonableness of the police conduct was inextricably woven into the determination of the defendant's guilt or innocence. Besides being prejudicial, such a thesis is entirely fallacious because our law allows a man to resist an intruder upon his property who appears to intend violence to anyone in the home and does not require him to retreat, even where a safe retreat can be made. (See Witkin California Crimes, Vol I pp. 153-154 and cases cited therein). In essence, this means that a

man could shoot an intruder upon his property who he believed threatened bodily harm, even if he was wrong and killed, maime or wounded an actual police officer in the lawful performance of his duties. In such a circumstance, there is no either-or questi for both police and a home dweller who rea- sonably believe that there is a violent intruder, can both act rightfully and legitimately.

At the trial court, Instruction 5.42 o the California Jury Instructions was read which deals with a man's right to resist an intruder upon his property. In part, the Instruction states:

"He may resist force with force, incre it in proportion to the intruder's persistence and violence if the circ stances which are apparent to the homeowner are such as would excite similar fears and a similar belief in a reasonable person."

Petitioner contends that had the jury not been confused by the erroneous instruction of Section 1531, they would have seen as the above instruction states that in determining the defendant's guilt or innocence, the real issue was the reasonableness of his fear and belief that there was a violent intruder who threatened bodily harm. In using the correct "reasonable man test," rather than the "either-or" test police conduct versus defendant's conduct which the trial court used, it is likely that a different conclusion would have been reached. The compromise verdict reached by the jury attests to some confusion on this point.

In applying the "reasonable man test" it is evident that under the given factual circumstances, the defendant's actions were not unreasonable. If the "reasonable man," placed himself in the shoes of defendant Smith on July 7, 1971, it is quite likely

that he would have acted in the same or a similar way. The woman who is the mother of defendant's son, has relayed to him recent incidents at her home of prowlers trying to break in, corroborated by neighbor's reports that they have observed prowlers around her home. Knowing that the woman and her daughter live alone, the defendant agrees to her request to stop by when he's not working to protect them. The incident occurred in a high crime area and there were guns in the bedroom for purposes of protection. Surely there is nothing extraordinary about people keeping guns in their bedroom for such purpos Thus far, we can find nothing unusual, abnorm or unreasonable about the defendant's conduct.

On the evening of the incident, the defendant was alone in the home except for Mrs. Smith's youngster. He falls asleep with the bedroom door closed and the televisi on. It is a fact of common knowledge that when a television is on, it will drown out

even the loudest of noises and oftentimes, voices. The defendant was awakened and startled by a large pounding noise and the barking of Mrs. Smith's dogs. He heard no voices or announcement preceeding it. In a response of self-defense, defense of the child, and his assumed duty to defend the home, he reached for his gun while hearing another large pounding noise. Upon opening the door he saw a 6'6 1/2" man charging towards him. Believing the man to be a violent intruder, his natural reaction was to shoot to protect himself and the child. The defendant even stated that he was aiming over the man's head. Would not the reasonable man be justified in his belief that such a man was a violent intruder into the home rather than an officer of the law in the lawful performance of his duties?

Petitioner contends that had he opened the door and seen the same man dressed in a

police officer's uniform, or the available precautions had been undertaken by the police, the violent confrontation would not have taken place.

The fact that the defendant was convic of the lesser included offense of Assault w a deadly weapon, (Penal Code Section 245) rather than Assault with attempt to commit murder, (Penal Code Section 217) strongly suggests that the jury was swayed into a compromise verdict by the erroneous restric tion focusing upon police compliance with section 1531 of the California Penal Code - The forcible entry statute.

III

EVIDENCE CODE SECTION 788 IS UNCONSTITUTIONAL BOTH ON ITS FACE AND AS HEREIN APPLIED IN THAT IT IS VIOLATIVE OF THE FAIR TRIAL, DUE PROCESS AND EQUAL PROTECTION OF LAW GUARANTEES OF BOTH THE FEDERAL AND STATE CONSTITUTIONS.

The facts attending the prior felony conviction, which was admitted to impeach the credibility of the defendant-witness, were minimal. No independent evidence was brought in support of either the existence or validity of the alleged aged conviction (R.T. p. 236-238). The prosecuting attorney was allowed to bring evidence of the prior based only on his good faith belief that such prior existed and from a "rap sheet" which indicated a Federal narcotics violation (R.T. p. 237, lines 3-6). From the facts presented, it is

impossible to claim that the prior conviction in question is related in any way to the issue of veracity. The judge failed to inquire further into the relevant facts surrounding the prior conviction although it was challenged. Petitioner here challenges the constitutionality of §788, the failure of the judge to exercise his discretion under Cal. Evidence Code §352 to exclude the evidence, and subsequent error in admitting the prior conviction into evidence without a limiting instruction to the jury.

It is quite true that court decisions have sustained Evidence Code §788, People v. Stewart, 240 A.C.A. 1, 50 Cal. Rptr. 26 (1966) or its forerunner, §2051 of the Code of Civil Procedure against attack on the grounds of questionable constitutionality in the past. However, most of the embryonic decisions failed to

reach the pivotal issues and frankly, only in recent times has there developed a body of law designed to forestall potential abuses to the defendant's right to a fair trial. Thus, we argue anew.

In the first place, it is axiomatic that in order to survive the application of the Equal Protection clause, the impeachment of a defendant via a felony conviction must not invidiously discriminate between that individual either threatened with impeachment or so impeached and other non-descripts not so burdened with past felony records. If it were not for the limiting instruction that the felony may be utilized only in evaluating the defendant's credibility as a witness, such an attempt to merely stigmatize an individual so as to lessen his chances of a fair and impartial verdict on present charges would be met with the most

severe reproach. In other words, only by establishing some relevancy between the past conviction and the present litigation can the State constitutionally create two classes of defendants--those whose guilt or innocence is determined by matters relating to the pending cause and those who must suffer the additional burden of hearing their criminal past paraded before the jury.

The next step in justifying the existence of those two categories of suspected offenders is to exhibit some justifiable rational connection between the fact of a felony conviction and the presumption that this constitutes probative data on the issue of credibility. Finally, it is necessary to assume that the jury--the trier of fact--can limit the effect of this testimony without allowing this precious knowledge of the defendant's

sordid past to seep over into the determination of guilt or innocence in general.

Within the foregoing format, let us first proceed to analyze the link, if any, bwtween the existence of a prior felony conviction and the assumption of diminished present veracity. If the fact of a felony record were legislatively stated to be the basis of a permissible inference by the jury that the defendant was untrustworthy it is clear that the test formulated in Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 (1943) and clearly in reign by virtue of Leary v. United States, 89 S.Ct. 1532, 395 U.S. 6 (1969); United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754 (1965); and United States v. Romano, 382 U.S. 136, 86 S.Ct. 279 (1965) would provide the criterion under which the validity of the statute and the presumption or inference authorized would be judged. That test

simply is "that there be a rational connection between the fact proved and the fact presumed" (89 S.Ct. at 1546). The fact that the assumed nexus between the commission of a felony and the fact of dishonesty is the legislative rationale underlying the impeachment statute rather than the statute itself cannot serve to avoid the analysis necessary under Leary, Tot and Co., for to do so would allow a conviction to be affected by a sub rosa policy of a legislative body which if elevated to a rule of law could not survive Constitutional objection.

Thus, the relevant question is what evidence is there that the mere fact that a person has experienced a felony conviction at some point, any point, in his past, makes it probable that as a present day witness, he is untruthful. Petitioner submits there is none!

Undoubtedly, the most troublesome aspect of impeachment by evidence of felony convictions is presented when the potential witness is the accused in a criminal case. The conventional view has long been that the accused who elects to take the stand is subject to impeachment as a witness, including impeachment by proof of any felony convictions (3 Wigmore, §§889-891). A growing uneasiness exists, however, that impeachment in this form not only often lacks any rational connection to the witness' willingness to tell the truth on the witness stand,

> ". . . but also may result in casting such an atmosphere of aspersion and disrepute about the defendant as to convince the jury that he is a habitual lawbreaker who should be punished and confined

for the general good of the community." [Richards v. United States, 89 U.S.App. D.C. 354, 192 F.2d 602, 605 (1951). See Griswold, The Long View, 51 ABAS 1017, 1021 (1965); Schaefer, Police Interrogation and the Privilege Against Self-Incrimination, 61 NWU L.Rev. 506, 512 (1966); Kalven and Zeisel, The American Jury, 124, 126-130, 144-146 (1966)].

Several amendments have been proposed to avoid the drawing of the above described forbidden inference, inevitable under this antiquated rule. One such amendment sought to limit the evidence to convictions of crimes which contain as an essential element "dishonesty or false statement." Such limitation was

recommended by the Law Revision Commission, but §788 was one of the relatively few sections of the Evidence Code which were not enacted in their proposed form. The rejection of this departure from tradition and statute (Code Civ. Proc. §2057) followed the hearings before the Assembly Interim Committee on Judiciary (Dec. 16 & 17, 1964). (Transcript of Proceedings on Proposed Code of Evidence, pp. 117-127, 137-139, 150.)

With as much respect as we can muster for the reasoning of those opposed to the change, we see no compelling argument which articulates the necessary causal nexus between the perpetration of a felony and a witness' tendency to tell the truth on the stand.

Such crimes as felony drunk driving, negligent manslaughter, arson (except for

fraudulent purposes), assault, possession of a deadly weapon, narcotics offenses or "sexual perversions" do not involve dishonesty or false statement and should not be allowed for impeachment purposes. They simply are not probative on the issue of present veracity.

How can the fact that a man was convicted of felony drunk driving (Cal. Veh. Code §23101) have any bearing on whether he will tell the truth or not? The absurdity of that contention is obvious, and we defy the Attorney General to inform us of a causal relationship we do not see.

Unfortunately, the irrationality of this law is obfuscated by the lack of any attempt to explain its effect. Due process of law at a minimum means procedural regularity and fairness. It is also settled that Due Process is infringed when

a law is in substance wholly arbitrary, where there is no arguable rational connection between the measure taken and some permissible state objective. (See, Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241 [1943]; Leary v. United States, 395 U.S. 6, 89 S.Ct. 1532 [1969]; United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754 [1965]; United States v. Romano, 382 U.S. 136, 86 S.Ct. 279 [1965], for established test which would provide criterion to judge the validity of actual legislation which states that a felony record is the basis of a permissive inference by the jury that a defendant is untrustworthy.) It is highly doubtful that any such "rational connection" between the fact proved and the fact presumed could be found between many felonies and the propensity of a witness to tell the

truth. A law specifically allowing impeachment by felonious drunk driving simply could not pass muster on due process grounds.

We demand an affirmative response to provide the connection we do not find. This Court should no longer be swayed by groundless arguments of tradition and more frightening arguments which would seem to undermine all efforts to provide a Fair Trial. To wit:

Assemblyman Dannemeyer said in the Interim Committee meeting discussing §788, that it would:

> ". . . insult the intelligence of the people to suggest that when a defendant has been convicted of a felony--I don't care what breed--takes the stand in his own defense, he should not be able to be

impeached on that ground. I admit that in more instances than not that [sic] you try to show that he is a bad apple, but isn't that true? Isn't that what he is for having suffered a conviction? Are we supposed to believe this person?" [Transcript of Proceedings on Proposed Code of Evidence, p. 124.]

Neither the prosecution nor the Court should sit back and accept the "bad apple" argument which intentionally allows tremendous and ineradicable prejudice to the person with a blemish in his past. Hopefully, we are not trying a man for his past crimes, or his criminal nature, but that is precisely what is possible under §788. Prior crimes, like robberies, suggest an inference not of lack of

credibility but rather that the defendant committed those crimes and will repeat them; he is a criminal. So the defendant with prior felony convictions has available the following decision:

> If I take the stand, they will convict me because I am a "robber"; if I don't, despite all instructions, they are going to think I am concealing something.

Although both Scylla and Charybdis are declared illegal, the accused must embrace one to avoid the other.

When the witness is the defendant in a criminal action, he suffers not only from the ordinary prejudice engendered by bad character evidence, but also from the prejudice created by the obvious relevance of the prior conviction to the question of guilt. The danger is that the jury is

likely to consider the accused a person who would commit the crime charged merely because of his past record, or, that, without too much concern for the insufficiency of the evidence, they may think that he is the kind of person who ought to be put away. (See McCormick, Evidence, §43 at p. 93 [1954]; 1 Wigmore, Evidence, §194 at p. 646, 3rd Ed. [1940]).

> "We need not dwell upon the substantial prejudicial effect of evidence of defendant's prior offenses in a criminal case."
>
> People v. Haston, 69 A.C. 237, 251 (Aug., 1968)

Thus, the offer of such evidence under the cloak of credibility creates "substantial danger of unde prejudice" (Cal. Evid. Code §352).

It is true that the jury may be instructed that evidence of a prior

conviction is limited to the issue of credibility. (See CALJIC 2-23 [3rd Revised Edition]; People v. Turner, 185 C.A.2d 513, 516 [1940]; People v. Shaw, 115 C.A.2d 597, 603 [1953]). The limiting instruction which was not even given in the present case, does little good, regardless. (See McCormick, Evidence, §43 at p. 93.) Recent jury studies conducted by the University of Chicago indicate that jurors almost universally fail to limit evidence of prior convictions to the issue of credibility despite limiting instructions from the judge. (See authorities cited in 70 Yale L.J. 763 at 777, Note 89.)

More and more courts are recognizing the inadequacy of limiting instructions which request that jurors disregard the obvious and exclude it from their minds. See discussion and cases cited in People v.

Aranda, 63 Cal.2d 518, 524-26, 528-31 (1965); see also Jackson v. Denno, 378 U.S. 368; Bruton v. United States, 88 S.Ct. 1620. We reiterate the fact that the limiting instruction was not given in the present case.

The dilemma faced by the defendant in a criminal action who has a prior felony conviction is onerous. If he testifies, he suffers the substantial danger that his prior conviction will be used against him on the question of guilt. If he does not testify, "his silence alone will prompt the jury to believe him guilty" (McCormick, Evidence at p. 93). An instruction from the court that the defendant has a right not to testify will be of little satisfaction to a juror who understandably wants to hear the defendant himself answer the charges against him.

To avoid the inevitable prejudice of such evidence, the defendant may choose rather to remain off the stand. Silence alone may, however, convict the defendant; the fact that the accused has a right to remain silent does not mean that the prosecution has a right to silence him. Yet §788 gives such power of coercion through the threat of presenting prior conviction evidence unrelated to the defendant's truth or veracity as a witness, remote in time, and highly prejudicial.

When a defendant is coerced into silence, he not only suffers from the inherent prejudice in that silence, but other fundamental rights are affected as well. In United States v. Jackson, 390 U.S. 570, 581 (1967), the court discussed chilling effects on constitutional rights and their patent unconstitutionality.

The right chilled here is the right to summon witnesses in your own behalf and confront the witnesses against you. How valid is the right to a jury trial, the right to be present at your own trial and the right to confront witnesses against you if you do not have the opportunity to take the witness stand and present your side of the case? To sit in silence and allow others to testify against you is probably a more prejudicial abridgement of those rights than if you were not even present.

Petitioner in the present case, made the decision to suffer the unjustifiable prejudice of the prior felony evidence in order to exercise his right to testify. He therefore did not suffer from the "chilling" effect of §788.

The unacceptable fact remains, however, that <u>either</u> choice compelled by

§788 results in a deprivation of constitutional rights. We need not be stuck with the antiquated rule represented by that section. As absolutely no rational nexus between a felonious incident in one's past and present lack of veracity can be demonstrated, that rule must fall.

In United States v. Plata (7th Cir.), 361 F.2d 958, 962, cert. den., 385 U.S. 841 (1966), the court said of the defendant's contention that there was error in permitting his impeachment by showing a prior crime:

"On numerous occasions, we have heard the argument that such evidence is unfair to a defendant and in some cases works a great hardship. We have sympathy with the argument but, even so, we do not feel disposed to abruptly strike down a rule so long

embedded in the law."

Is there no legal argument sustaining that rule besides age? If so, let us hear it. Such a rule anchors the law to an era completely unresponsive to the criminal defendant's rights of due process. We urge that the opportunity and indeed responsibility of the court be met.

Section 788 must be pried from its aged and unreasoned place in our law and it must be done now!

Petitioner has here claims that serious constitutional issues arise from §788: violation of due process and equal protection of law under the Fourteenth Amendment; denial of the Sixth Amendment rights to testify in one's own behalf and to present witnesses. (See, Notes, Constitutional Problems Inherent in the Admissibility of Prior Record Conviction

Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness, 37 U.Cinn.L.Rev. 168 (1968). It will be shown that efforts have been made to meet these constitutional objections by providing special protections to limit laws similar to §788.

A./ METHODS OF AMELIORATING PREJUDICE TO THE CRIMINAL DEFENDANT FROM EVIDENCE CODE §788: REJECTED IN CALIFORNIA

The Constitutional objections to §788 inextricably tied to the earlier discussed prejudicial effect on the criminal defendant, have led to methods of ameliorating that prejudice. One method has been to limit prior convictions for impeachment purposes to those with "dishonesty and false statement"

as essential elements.*

We have witnessed the unreasoned rejection of that proposal in California. (See "Transcript of Proceedings on Proposed Code of Evidence," supra, pp. 117-127, 137-139, 150; Assembly Interim Committee on Judiciary, Dec. 16 and 17, 1964.) The constitutional effect of that rejection is obvious. A law which allows the defendant-witness to be cross-examined regarding all prior felony convictions (as under §788) is an unreasonable classification, and should be considered an invidious discrimination between defendants with priors and those without, due to the lack of a reasonable

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* See Uniform Rules of Evidence, Rule 21: "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility."

nexus between all felonies in general and a person's tendency to testify untruthfully.

The challenge remains open to show that nexus. A classification allowing only crimes of falsehood to be introduced into evidence to impeach the defendant's credibility might not be unreasonable, however, because those crimes bear a direct relationship to defendant's predilection for truthfulness. The probative value of the evidence would still have to be weighed against probable prejudice, but at least one constitutional violation would be avoided.

Another method, incorporated in the Revised Draft (March, 1971) of the Proposed Rules of Evidence for the United States Courts and Magistrates (included in Supp. No. 3, 437 F.2d, April 12, 1971) is the imposition of a time limit on

impeachment by evidence of former conviction. Practical considerations of fairness and relevance demand that some boundary be recognized. (Advisory Committee Notes to Proposed Rules of Evidence, 609[b] [10 year limitation]; see also, Ladd, Credibility Tests--Current Trends, 89 U.Pa.L.Rev. 166, 176-177 [1940]).

In the case before us, use of a seventeen-year old conviction, totally unrelated to the offense charged, is undeniably too remote in time to warrant any reasonable inference. Even if it would tend to enlighten the jury as to the defendant's past veracity as a witness, it is too far removed to prove credibility today. An alleged conspiracy to deal in narcotics has no arguable tendency to display a special proclivity to lie, so that even the former inference is indefensible.

We have in California, therefore, a chain of inferences, none of which are supportable by refusing to adopt the time and class limitations on the prior-impeachment rule. The chain of relevancy proceeds from past conduct to present character and on to present conduct. Sventeen-year old conduct does not tend to establish present character in any form. The initial inference, though unwarranted due to remoteness in time, could not establish a specific tendency to falsify; rather, only a general unsavory nature. From this forbidden and impossible remote inference of general bad character, the jury is now entitled to conclude that the defendant is lying in fact (see McCormick, Evidence, §161).

The link between general bad character and the particular disposition to lie is the weakest in the inferential

chain. The one limitation of §788 to felonies is of little advantage, as the gravest of felonies, murder, reveals less about a man's honesty than many less serious crimes. (See generally, Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 744-748 [1961]; Note, Impeaching the Accused by His Prior Crimes--A New Approach to An Old Problem, 19 Hastings L.J. 919, March, 1968.)

In general, the law regards with disfavor attempts to prove through a man's character, his conduct on a specified occasion. (See, McCormick, supra, §155; 1 Wigmore §64; Cal. Evid. Code, §787.) Section 788 is an exception to that character rule, but an exception with a historical basis and no other. By ignoring the aforementioned methods of

mitigating the injurious effect of this law, the courts in California are allowing a practice unjustifiably absurd and reprehensible to persist unassuaged.

B./ BROAD DISCRETION OF THE TRIAL COURT TO EXCLUDE EVIDENCE UNDER §788: A LAST CHANCE TO RETURN A SEMBLANCE OF RATIONALITY AND LEGALITY TO THAT SECTION OF CALIFORNIA EVIDENCE LAW.

Perhaps the most effective method to protect the criminal defendant from this rule has been the expansion of the judge's discretion to exclude evidence of a prior conviction if the Court determines that its probative value is outweighed by the danger of unfair prejudice. 4/

4/ This requirement to exercise discretion is incorporated in the Proposed Rules of Evidence (Rule 609[a]); see Advisory Committee Notes, p. 79.

This provision found its genesis in Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); (see also, Brown v. United States, 370 F.2d 242 (1966); Gordon v. United States, 127 U.S. App.D.C. 343, 383 F.2d 936 (1967), and has finally been recognized in California law People v. Beagle, 6 Cal. 3d 441, 99 Cal. Rptr. 313 [1972]).

The California Supreme Court in Beagle overturned the rule of a line of Court of Appeal decisions which had reached the conclusion that the trial judge has no discretion to exclude evidence of a prior felony conviction when the lawfulness of that conviction is established or uncontested. (See, e.g., People v. House, 12 C.A.3d 756 [90 Cal.Rptr. 831 (1970); People v. Snead, 8 C.A.3d 963, 88 Cal.Rptr. 32 (1970); People v. Romero, 272 C.A.2d 39, 77 Cal.Rptr. 175 (1969);

People v. Kelley, 261 C.A.2d 708, 68 Cal. Rptr. 337 [1968]).

Therefore, California Evidence Code §352 now applies to §788. Section 352 states that:

> "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury."

The factors to be weighed in determining the admissibility of prior felony convictions, have been articulated in recent D.C. Circuit cases relied upon and cited by the California Supreme Court in

People v. Beagle. See Luck v. United States, 348 F.2d 763 (1965; Brown v. United States, 370 F.2d 242 (1966); Gordon v. United States, 383 F.2d 936 (1967); see People v. Beagle, 6 Cal.3d at p. 452-454, 99 Cal.Rptr. at p. 319-320.

In Luck v. United States, 348 F.2d 763 (1965), after reversing a conviction on other grounds, the Court of Appeals stated that upon retrial:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a

particular case.* There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply

*The statute 14 D.C. Code #305 (1961)--is virtually identical to California Evidence Code §788.

every day in other contexts; and we think it has both utility and applicability in this field.

"In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." Luck v. United States, 348 F.2d 763, 768-769. (See People v. Beagle, supra, 6 Cal.3d at 452, 99 Cal.Rptr. at 319.)

In Gordon v. United States, 383 F.2d 936 (1967), the Court affirmed a

conviction, finding that the trial court had exercised discretion before ruling that evidence of a prior conviction was admissible for impeachment, and that in the absence of plain error, such discretion would not be disturbed on appeal.

For the benefit of trial judges, however, the present Chief Justice Burger, presented a majority opinion which discussed matters that should properly be considered in exercising such discretion. In ruling upon the admissibility of a prior conviction for impeachment, the trial court must consider:

1. Whether or not the prior conviction was by a plea of guilty. (The relevance of a prior conviction to credibility may well be different where there was a guilty plea rather than testimony by the accused that he did not commit the

offense and that he had an alibi.)

2. Whether or not the prior conviction was for a crime related to honesty or integrity, such as embezzlement, theft, fraud or deceit.

3. The nearness or remoteness of the prior offense.

4. Whether or not the prior is for the same or similar conduct as that for which the defendant is on trial.

5. Other factors, for example, the importance of the jury having the benefit of the defendant's testimony. (See Gordon v. United States, 388 F.2d at 940-941.)

nexus between all felonies in general and a person's tendency to testify untruthfully.

The challenge remains open to show that nexus. A classification allowing only crimes of falsehood to be introduced into evidence to impeach the defendant's credibility might not be unreasonable, however, because those crimes bear a direct relationship to defendant's predilection for truthfulness. The probative value of the evidence would still have to be weighed against probable prejudice, but at least one constitutional violation would be avoided.

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The link between general bad character and the particular disposition to lie is the weakest in the inferential

chain. The one limitation of §788 to felonies is of little advantage, as the gravest of felonies, murder, reveals less about a man's honesty than many less serious crimes. (See generally, Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 744-748 [1961]; Note, Impeaching the Accused by His Prior Crimes--A New Approach to An Old Problem, 19 Hastings L.J. 919, March, 1968.)

In general, the law regards with disfavor attempts to prove through a man's character, his conduct on a specified occasion. (See, McCormick, supra, §155; 1 Wigmore §64; Cal. Evid. Code, §787.) Section 788 is an exception to that character rule, but an exception with a historical basis and no other. By ignoring the aforementioned methods of

mitigating the injurious effect of this law, the courts in California are allowing a practice unjustifiably absurd and reprehensible to persist unassuaged.

B./ BROAD DISCRETION OF THE TRIAL COURT TO EXCLUDE EVIDENCE UNDER §788: A LAST CHANCE TO RETURN A SEMBLANCE OF RATIONALITY AND LEGALITY TO THAT SECTION OF CALIFORNIA EVIDENCE LAW.

Perhaps the most effective method to protect the criminal defendant from this rule has been the expansion of the judge's discretion to exclude evidence of a prior conviction if the Court determines that its probative value is outweighed by the danger of unfair prejudice. 4/

4/ This requirement to exercise discretion is incorporated in the Proposed Rules of Evidence (Rule 609[a]); see Advisory Committee Notes, p. 79.

This provision found its genesis in Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); (see also, Brown v. United States, 370 F.2d 242 (1966); Gordon v. United States, 127 U.S. App.D.C. 343, 383 F.2d 936 (1967), and has finally been recognized in California law People v. Beagle, 6 Cal. 3d 441, 99 Cal. Rptr. 313 [1972]).

The California Supreme Court in Beagle overturned the rule of a line of Court of Appeal decisions which had reached the conclusion that the trial judge has no discretion to exclude evidence of a prior felony conviction when the lawfulness of that conviction is established or uncontested. (See, e.g., People v. House, 12 C.A.3d 756 [90 Cal.Rptr. 831 (1970); People v. Snead, 8 C.A.3d 963, 88 Cal.Rptr. 32 (1970); People v. Romero, 272 C.A.2d 39, 77 Cal.Rptr. 175 (1969);

People v. Kelley, 261 C.A.2d 708, 68 Cal. Rptr. 337 [1968]).

Therefore, California Evidence Code §352 now applies to §788. Section 352 states that:

> "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury."

The factors to be weighed in determining the admissibility of prior felony convictions, have been articulated in recent D.C. Circuit cases relied upon and cited by the California Supreme Court in

People v. Beagle. See Luck v. United States, 348 F.2d 763 (1965; Brown v. United States, 370 F.2d 242 (1966); Gordon v. United States, 383 F.2d 936 (1967); see People v. Beagle, 6 Cal.3d at p. 452-454, 99 Cal.Rptr. at p. 319-320.

In Luck v. United States, 348 F.2d 763 (1965), after reversing a conviction on other grounds, the Court of Appeals stated that upon retrial:

> "The trial court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a

particular case.* There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction. There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply

*The statute 14 D.C. Code #305 (1961)--is virtually identical to California Evidence Code §788.

every day in other contexts; and we think it has both utility and applicability in this field.

"In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." Luck v. United States, 348 F.2d 763, 768-769. (See People v. Beagle, supra, 6 Cal.3d at 452, 99 Cal.Rptr. at 319.)

In Gordon v. United States, 383 F.2d 936 (1967), the Court affirmed a

conviction, finding that the trial court had exercised discretion before ruling that evidence of a prior conviction was admissible for impeachment, and that in the absence of plain error, such discretion would not be disturbed on appeal.

For the benefit of trial judges, however, the present Chief Justice Burger, presented a majority opinion which discussed matters that should properly be considered in exercising such discretion. In ruling upon the admissibility of a prior conviction for impeachment, the trial court must consider:

1. Whether or not the prior conviction was by a plea of guilty. (The relevance of a prior conviction to credibility may well be different where there was a guilty plea rather than testimony by the accused that he did not commit the

offense and that he had an alibi.)

2. Whether or not the prior conviction was for a crime related to honesty or integrity, such as embezzlement, theft, fraud or deceit.

3. The nearness or remoteness of the prior offense.

4. Whether or not the prior is for the same or similar conduct as that for which the defendant is on trial.

5. Other factors, for example, the importance of the jury having the benefit of the defendant's testimony. (See Gordon v. United States, 388 F.2d at 940-941.)

C./ EVEN IF SECTION 788 WERE CONSTITUTIONAL, THE RECORD INDICATES A BLATANT FAILURE OF THE TRIAL COURT TO APPLY THE STANDARDS ARTICULATED BY THE CALIFORNIA SUPREME COURT IN PEOPLE V. BEAGLE RESULTING IN THE CLEARLY ERRONEOUS ADMISSION OF PETITIONER'S ALLEGED PRIOR FELONY CONVICTION.

Let us examine petitioner's purported seventeen-year old prior conviction, under the aforedescribed criteria.

From the record, the only information to be ascertained about the prior is the alleged crime and the time the crime was committed. The Gordon standards, as recapitulated in Beagle, immediately demand two conclusions from the above information: one, the judge must conclude that the prior

conviction was for a crime not related to honesty; and two, the prior offense allegedly committed seventeen years before the present offense, was clearly remote in time. The prejudicial effect of admitting evidence of a prior conviction has been thoroughly discussed. From the record we have two solid indications of a lack of probative value on the issue of credibility. On balance it would appear from these facts alone that the prior conviction should have been excluded. Further, the record is seriously defective in presenting any evidence whatsoever about the circumstances and validity of the prior conviction. One standard which the Gordon court determined essential in the trial court's consideration of admissibility was whether or not the prior conviction was by a plea of guilty. The evidence before the trial court was so

deficient that that court could not possibly give this factor the required consideration. The court did not know nor demand to know any of the facts attending the prior conviction; in fact, the validity of that conviction was and remains in question. The record provides no assistance. Even before the Beagle opinion, i.e., before the trial court was allowed discretion in determining admissibility under §788, the lawfulness of that conviction had to be established or uncontested. See, e.g., People v. Beagle, 6 Cal.3d at 451, 99 Cal. Rptr. at 319, People v. House, 12 C.A.3d at 762-763, People v. Romero, 272 C.A.2d at 45-46. In the present case, the lawfulness of the conviction was not established and it was contested (R.T. p. 236-238). The prosecuting attorney was allowed to bring evidence of the prior based only on his

good faith belief that such prior existed and from a "rap sheet" which indicated a Federal narcotics violation (R.T. p. 237, lines 3-6).

No further details were known by the judge concerning the existence and/or validity of that conviction. When challenged by the defense counsel, he had an affirmative duty in order to properly exercise his discretion to exclude the evidence, to demand more.

It has been held that a conviction obtained in violation of the defendant's constitutional rights is not available to impeach him in a later prosecution. In re Woods (1966), 64 Cal.2d 3, 48 Cal.Rptr. 689; People v. Coffey, 67 Cal.2d 215, 204, 60 Cal.Rptr. 457 (1967). The procedure for determining the constitutional validity of prior convictions is as follows: (1) the

defendant must raise the issue; (2) the prosecution must produce evidence that there was a prior conviction; (3) the defendant has the "burden of producing evidence that his constitutional right to counsel was infringed in the prior proceeding at issue"; (4) if the defendant bears this burden, the prosecution may rebut; and (5) the court shall make its finding (People v. Coffey, supra, 60 Cal.Rptr. at 466).

Footnote 15 of the Opinion states:

> "Though the burden of proof as to the constitutionality of the charged prior conviction remains with the prosecution, and the burden of producing evidence rests initially with it, the latter burden shifts to the defendant upon proof of the fact of his

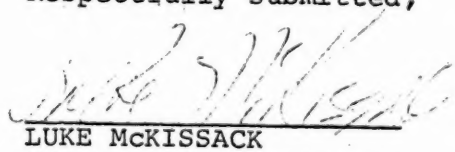
having 'suffered' the prior conviction." (Evid. Code, §550) (Emphasis added.)

In the present case, no such procedure was possible, as the prosecution failed to comply with the initial requirement of producing evidence concerning the conviction. The trial court therefore, abused its discretion by failing to demand such evidence which might have made a constitutional challenge and subsequent exclusion of the prior conviction, possible.

CONCLUSION

For the aforegoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioner

(Not for publication)

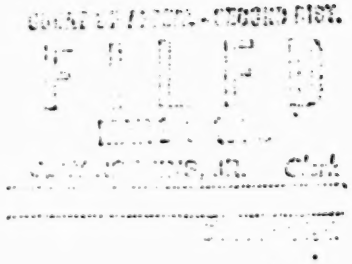
APPENDIX "A"

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EARL G. SMITH, Defendant and Appellant.	Crim. No. 21908 (Superior Court No. A-275311)



APPEAL from a judgment of the Superior Court of Los Angeles County. Jack E. Goertzen, Judge. Affirmed.

Luke McKissack for Defendant and Appellant.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, Norman H. Sokolow and William V. Ballough, Deputy Attorneys

General, for Plaintiff and Respondent.

By information, defendant was charged in three counts with (Count I) assault with a deadly weapon with intent to murder L. Del Rosario on July 7, 1971, a felony, in violation of Pen. Code § 217, (Count II) assault with a deadly weapon with intent to murder C. Sears on July 7, 1971, a felony, in violation of Pen. Code § 217, and (Count III) possession by a convicted felon of a concealable firearm, a felony, in violation of Pen. Code § 12021. Before the trial began the People's motion to dismiss Count III was granted. A jury found defendant guilty, on both counts, of assault with a deadly weapon, a felony, in violation of Pen. Code § 245, an offense included within the crimes charged. The court sentenced defendant to state prison on both convictions, the sentence on Count II being suspended pending completion of the sentence on Count I. Defendant appeals from "the conviction . . . the

Judgment and Sentence."[1/]

Evidence showed that on July 7, 1971, during daylight hours, plainclothes police officers went to 3660 West 58th Place, Los Angeles, to serve upon Dorothy Cummings (also known as Dorothy Smith) a warrant to search and arrest her and to search the described premises, where she resided. The purpose of the search warrant was to look for narcotics and narcotic paraphernalia. The officers apprehended the woman at a nearby interesection and arrested her. She stated her daughter was in the house as was "her husband, or her boyfriend." After Cummings was arrested, Officer Del Rosario went to a side door of her house, knocked and in a loud voice called out, "Police officer. I have a search warrant for this location. Open the door." After waiting approximately a half minute, the same officer again knocked and repeated the same words again in a loud voice.

1/ The appeal from the judgment is proper (Pen. Code § 1237), appeals from the "sentence" and the "conviction" being here treated as surplusage.

Officer Sears, who was with him, heard the sound of receding footsteps inside and also hollered out "Police officer, open the door. We have a search warrant." Receiving no response, officer Del Rosario kicked the door open and both officers entered to be met by pistol fire. Del Rosario was wounded. Officer Sears fired back, finally hitting defendant who, by then, was behind the door of a bedroom from which he emerged and surrendered. Meanwhile, the daughter had run out the front door of the house and hid in some bushes.

Defendant first contends the forceable entry was a violation of the constitutional rights of the two people in the house, arguing that the police officers should have asked Dorothy Cummings (Smith) "to assist in effecting entry so as not to alarm the occupants." Appellant argues that, even though the officers complied with Pen. Code § 1531, the police conduct was not reasonable and was an intrusion upon the privacy of the defendant and the young girl in the house. We disagree.

There are several responses to appellant's contention. First, the officers went to the premises to search for narcotics and narcotic paraphernalia, (and, in fact, found a good deal of it there). "Assistance" from the woman well could have resulted in concealment or destruction of the evidence sought.

Second, Pen. Code § 1531 states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." The officers fully complied with the statute. Third, we are aware of no constitutional or other requirement that police officers request civilian aid in serving a search warrant.

Appellant next contends the trial court erred in reading, by way of instruction to the jury, Pen. Code § 1531, arguing that the quotation from the code led the jury to believe the rights of the police officers and defendant's right to self-defense were mutually exclusive rights so that he was

precluded "from having a reasonable belief in his right to exercise self-defense." We find no error.

In his defense, defendant testified he did not hear the officers call out and believed they were "robbers" and that, had he known they were police officers, he would not have fired at them. The officers were in plainclothes, although officer Sears testified his 3 1/2" x 2" badge was affixed to the left side of his shirt. Defendant testified he fired at the leading officer (Del Rosario) first, believing himself to be acting in self-defense. Obviously because of this evidence, the court gave several instructions on self-defense, including CALJIC No. 5.42.[2/] This instruction does not conflict with Pen. Code § 1531, since that code section does not require acquiescence in

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2/ This instruction read, in part, as follows: "A person may defend his home or habitation against anyone who manifestly intends or endeavors in a violent or riotous manner, to enter that home or habitation and who appears to intend violence to any person in that home. The amount of force which the person may use in resisting such trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. . . . He may resist force with force . . . ."

a forced entry by an occupant. Defendant's defense was not interfered with by the instruction.

Finally, appellant contends the court erred in permitting the prosecution, on cross-examination of him, to bring out a prior narcotic conviction he had sustained. Defendant argues the matter as though the evidence were offered and admitted under Evid. Code § 788, which deals with impeachment by proof a witness has been convicted of a felony. However, the evidence was not offered or received under that section. Rather, the evidence was offered and receivable pursuant to Evid. Code § 780 and § 1101, subd. (b). Thus, defendant had testified he did not see any balloons containing narcotics, which the officers had testified they observed in the house's living room. He denied knowing what heroin looked like. It was following this answer that he was asked if he previously had been convicted of selling heroin. He admitted that he had been convicted of a conspiracy to sell narcotics but denied that he ever saw such narcotics, as he merely collected the money for them.

According to the record, the prosecutor's questions were asked in good faith, based upon a "rap sheet" in his possession. The questions had two purposes. First, Evid. Code § 780 authorized the questions. That section begins: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . . ." In view of defendant's statement that he did not know what heroin looked like, it was proper to test the truth of that answer.

Second, inasmuch as heroin and cocaine were in the house, evidence establishing defendant's knowledge of it could indicate that his motive in firing at the officers was not self-defense but, instead, was to protect the contraband or to avoid arrest. The court gave an instruction limiting the effect of defendant's testimony, advising the jury: "If you believe that the evidence tends to show that the defendant committed crimes other than that for which he is on trial: Such evidence was not received and may not be

considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: A motive for the commission of the crime charged . . . . You are not permitted to consider such evidence for any other purpose." The court also read to the jury CALJIC instruction No. 2.51 dealing with the presence or absence of motive as a circumstance to be considered.

In light of the entire record, we find no error or, if error there was, no prejudice to the defendant.

The judgment is affirmed.

NOT FOR PUBLICATION.

DUNN, J.

We concur:

JEFFERSON, Acting P.J.

KINGSLEY, J.

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 16 1973

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Crim. *No.* 21908

People

vs.

Smith

Respectfully,

G. E. BISHEL
Clerk

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Blvd., Ste. 521, Hollywood, Ca. 90028.

On August 15, 1973, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on the PETITIONER in said action by placing a true copy thereof enclosed in sealed envelope with postage thereon fully prepaid, in the United States mail at the post office, Hollywood, Ca., addressed as follows:

Court of Appeal
Second Appellate District
State Bldg.
217 W. First St.
Los Angeles, Ca. 90012

Solicitor General
Dept. of Justice
Washington, D. C. 2053

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 1973, at Hollywood, Ca.

Rebecca Ramsey